IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 71.

THE UNITED STATES OF AMERICA, APPELLANT.

vs.

EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL,

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Circuit Court of Appeals for the fifth circuit, affirming a decree of the Circuit Court of the United States for the Middle District of Alabama, which sustained demurrers by appellees to the bill of complaint herein and dismissed the bill.

The bill which was filed in March, 1890, presents the following facts:

In June, 1873, Eugene Beebe and Ferrie Henshaw became the sureties on the official bond of Francis Widmer, as Collector of Internal Revenue for the Second District of Alabama. Penalty of the bond was

$50,000.00, and was payable and conditioned as by law required. Widmer did not faithfully perform the duties of his office, in that he failed and refused to pay over to the Government the sum of $28,158.56, public money, which had come into his possession as such Collector. This sum has never been paid to the United States. At the time of the execution of this bond, and for many years thereafter, Beebe and Henshaw owned a large quantity of real estate, which is specifically set out in the bill. That Henshaw died in April, 1879, leaving as his heirs at law, the numerous parties mentioned in section 3 of the bill, page 4 of Record. The bill further states that Eugene Beebe, Ferrie Henshaw and the estate of Henshaw were, on the date of the filing of the bill, and have been uninterruptedly since and prior to the year 1873, "owners of all the property hereinabove described, which is of the value of $50,000.00." See section 3, page 4 of record. That in June, 1879, one Hatchett was appointed Administrator of the estate of Henshaw, and in April, 1880, reported the estate as insolvent to the Probate Court of Montgomery county. In July, 1880, that Court declared the estate insolvent. Hatchett was removed as Administrator in December, 1882, and one Bellinger was appointed his successor in office. Bellinger resigned the office as Administrator in November, 1883, and nothing whatever has been done in the Probate Court in the matter of this estate.

The estate remains wholly unsettled, and its assets were and are, insufficient to pay the debts of said estate. See sec. 4, p. 5 of Record. Eugene Beebe was insolvent, and his estate is also insolvent and unable to pay his debts, including the claim of $28,158.56, the subject matter in this suit. It is shown by the Bill of Revivor against the heirs at law of Beebe; that he died in 1894. Page 49 of Record. W. R. Waller was appointed Adminis-

trator of Beebe's estate, and filed demurrers to bill as amended. Page 54 of Record.

It is further shown that in June, 1880, see section 7, page 5 of record, *separate* suits at law were begun in the Circuit Courts of the United States at Montgomery, Alabama, against said Beebe, and against William T. Hatchett, as Administrator of Henshaw's estate, on Widmer's said bond, to recover the amount of the Collector's default. These suits were continued from time to time at the request of said Defendants, until February 6th, 1885, see section 7, page 5 of record, when judgments were *severally* entered in said Court against said Hatchett, as Administrator of Henshaw, and against said Beebe for $100,000 and costs. Beebe, on the 1st of July, 1886, see section 7, page 5 of record, paid into the treasury of the United States one hundred and nine and eighty-five one-hundredths dollars ($109.85) against him; but the judgment against Hatchett, as Administrator of Henshaw, has *never* been paid.

The judgments were obtained under the following circumstances: The Defendants in open court stated that Beebe and Henshaw were poor men. That Beebe's and Henshaw's estate had no property out of which the Government could make the claim against them. They represented that if the Court would allow a jury and verdict against them for one hundred dollars ($100.00), *each* of them would pay such judgment and costs. No evidence of any kind was introduced in these cases, or either of them. See section 7, page 5 of record.

The indebtedness of said Beebe, and the estate of Henshaw to the Government was $28,158.56 as on account of said Widmer's bond. No hearing on the law or facts of the case were ever had. On Beebe and Hatchett making the statements aforesaid, the presiding judge of the Court remarked that unless the District Attorney for the United

States objected, the case might be disposed of as suggested. The District Attorney did *not* object, and the judgments were entered in *each* of these cases as suggested by the Defendants. The bill avers, sec. 7, page 6 of the record, that the statements made by the Defendants as to solvency, were wholly untrue, and were made to deceive the Court and the United States Attorney, and for the purpose and with the intent to defraud the United States.

It is charged that the District Attorney had no authority to accept the statements of the Defendants, which were unsworn. That the act of the District Attorney was a mere naked compromise of the said large claim of the Government, which neither the District Attorney nor the said Circuit Court had any authority to make, but were inhibited by the law to make, entertain and consummate; that said court was without jurisdiction to determine said cases in the manner in which it was done, and that the judgments as rendered were void *ab initio*, and should be treated as in a Court of Equity.

The bill goes on to aver, that the various other defendants named, assert some claim to the real estate named in the bill, but the nature and extent of the claims is not known to Complainant. It shows that Beebe had conveyed, or attempted to convey it to Henshaw on the 22d day of March, 1877.—See section 11, page 7 of the Record. See deed marked exhibit "B" of the bill, pages 12, 13, and 14 of the Record—but avers that this deed was without consideration, made to hinder, delay and defraud existing creditors and was null and void, and that all attempted conveyances of the land in question was made in subordination to the complainants claim against Beebe and Henshaw. On the 5th day of January, the bill was amended—Record pages 28, 29

and 30, by setting up an additional claim on Appellants against Beebe as follows:

In January, 1872, Beebe became the surety on the official bond of one Dustan as Deputy Postmaster at Demopolis, Alabama, the bond was in the amount of $12,000 and was payable and conditioned as prescribed by law. That Dustan made default to the Government in the sum of $441.49. That a judgment against Beebe on this bond was rendered in the United States Circuit Court aforesaid, December 26th, 1878, for $579.45 together with costs, which amounted to $53.82, and that this amount is still due and unpaid. See page 29 of record.

The following averment was also added to the bill by the amendment, viz:—That Henshaw, as assignee of Beebe, under the said deed marked exhibit "B," and the heirs of Henshaw had paid various debts of Beebe and had failed to pay the debts evidenced by the judgment on the Dustan's bond, which was a prior claim under such assignment or deed, which it will be observed on inspection, provided for the payment by Henshaw of certain debts of Beebe's, and, after this was done, the real estate was to be reconveyed to Beebe, his heirs or assigns. The prayer of the bill (Record pages 8 and 9) is that the said judgment for $100.00 each against Beebe and Henshaw's Administrator be set aside and vacated; that the administration of Henshaw's estate be removed into and settled in the United States Circuit Court; that an account be stated between the parties before a Master, to ascertain the amount due to the United States on account of the liability of Beebe and Henshaw on the said bond of Widmer as Collector; to ascertain and report upon the claims, liens or encumbrances, if any, upon the said property; and that on the coming in of the report the said sum found due to the Government be held a prior lien and

charge on the said real estate; that all conveyances and assignments of said property in conflict with said lien of the United States be set aside and held for naught, and that the property be sold by the Master, for the payment of said indebtedness, free of all incumbrances, and the proceeds of the sale, after satisfying the Appellant's claim, be distributed amongst those who are found entitled thereto. There was a prayer for an injunction and receiver of the property *pendente lite.*

All the parties appeared and filed numerous demurrers to the bill as originally filed and as amended. Without undertaking to set out all these demurrers, it may be stated that, avoiding the needless repetition adopted by counsel for appellees, the grounds of objection to the original bill raised by them, are as follows:

1st. The bill is without equity.

2nd. That the bill shows that the Government's claim has been finally adjusted in a Court of competent jurisdiction, viz: the Circuit Court of the United States for the Middle District of Alabama, and no sufficient grounds are alleged for setting aside the judgment.

3rd. That the bill is multifarious in this, that it unites separate and distinct parties, claiming separate and distinct interests in the property sought to be to the subject payment of the Government's claims.

4th. That the bill is multifarious in that it joins Beebe, his heirs, and estate; the claimants of the property and the heirs of Henshaw, without showing that the claim against Henshaw and Beebe was a joint claim.

5th. That the bill shows that the judgments against Beebe and Henshaw in favor of the Government were rendered by and with the consent of the U. S. Attorney, and fails to show that such consent was obtained by any

fraud practiced on the District Attorney by Beebe or the representative of Henshaw, or through any accident or mistake without fault or negligence on the part of the District Attorney.

The grounds of demurrers assigned to the bill as amended in addition to those set up in the demurrers to the bill as originally filed, which are re-"assigned to" the amended bill, are as follows:

1st. That the amended bill makes a new case.

2d. That it is multifarious in that the subject matter of the original and amended bills are disconnected.

3d. That as to the judgment against Beebe on the Dustan bond, the amended bill does not show that Henshaw or his heirs had any notice of the Government's claim evidenced by said judgment, or that, having such notice he or they made any payment on Beebe's debts in derogation of the Government rights. Such, in brief are the facts and pleadings in this case, and the same being agreed and submitted on the 29th day of May, 1897, the United States Circuit Court rendered its decree sustaining all the demurrers to the bill, as amended, and dismissing the same out of the Court—Pages 46 and 47 of the Record, and on appeal this demurrer was affirmed by the Circuit Court of Appeals.—Record, page 65. From which said decree of affirmance this appeal is taken.

ASSIGNMENT OF ERRORS.

The following assignment of errors was filed in the Circuit Court of Appeals. (Record, pages 61 and 62.)

1. The said circuit court of appeals erred in affirming the decree in said cause of the circuit court of the United States for the middle district of Alabama sus-

taining the demurrers filed by the appellees and dismissing the bill of complaint of the United States.

2. Said circuit court of appeals erred in reversing the decree in said cause of the circuit court of the United States for the middle district of Alabama.

3. Said circuit court of appeals erred in not maintaining the bill filed by the United States in said cause and in not remanding the said cause to the circuit court of the United States for the middle district of Alabama for further proceedings under said bill.

4. Said circuit court of appeals erred in holding that "The alleged false statements in the suit brought by the United States on the bond in question were not such as to deceive a person of ordinary care."

5. Said circuit court of appeals erred in holding that said statements "could not have deceived the district attorney who represented the Government; either as to the amount due on the bond or as to the property owned by the defendants."

6. The said circuit court of appeals erred in holding that said statements "did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so."

7. Said circuit court of appeals erred in holding in effect that the rights of the United States were affected by the acceptance by the officers of the Treasury Department of the sum of one hundred dollars, with interest, from Beebe, one of the defendants, in satisfaction of one of the judgments sought to be set aside.

8. Said circuit court of appeals erred in holding that "The facts of the case bring it under the well-known rule announced in U. S. vs. Throckmorton (98 U. S.,61) and the cases following it."

9. The said circuit court of appeals erred in not holding that the judgments against which the bill in this

case is directed and which are sought to be set aside were in fact and effect illegal attempts to compromise claims and rights of, and amounts due to, the United States, and therefore void and of no effect.

10. The said circuit court of appeals erred in not holding that neither the officers of the Treasury Department nor the attorney nor any other officer cannot, directly or indirectly, compromise a claim of the United States, except in the manner and form provided by law, and that compromises of claims due to the United States have no validity, force, or effect, even though made through and by means of a judgment obtained for that purpose, unless the special requirements of the law upon the subject have also been followed and complied with.

11. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were obtained by the fraud and misrepresentation of Beebe, one of the defendants, and of the personal representative of Henshaw, another of the defendants, and that said judgments are void.

12. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect nothing more than unauthorized, illegal, null, and void attempts to compromise the claim of the United States against the defendants Beebe and Henshaw of over twenty-eight thousand dollars for the sum of two hundred dollars.

13. That said circuit court of appeals erred in holding that this is a suit to set aside and annul the judgment of a court regularly entered, in a matter on which it had jurisdiction on the ground only "that the said defendants Beebe and Henshaw stated to the court that they were poor men and were without property; that

nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and United States attorney, and with the intent to defraud the United States."

ARGUMENT.

From a mere cursory reading of these proceedings, the Court will see that the *first* and *crucial* question in this case is: "Were the judgments against Eugene Beebe and Ferrie Henshaw rendered under the circumstances set out in the bill as originally filed,—paragraph 7, pages 5 and 6 of the Record—and in the amended bill—pages 28, 29, 30—of the Record void, as having been mere unauthorized compromises of the Government's claim against Beebe and Henshaw for over $28,000.00 for $200.00, and one obtained by the fraud and misrepresentation of Beebe and Henshaw's personal representative. This involves, of course, the power of an attorney to compromise a client's claim, whether there is any difference in the relation of a District Attorney to the Government and that of any other attorney to his client, and whether the concurrence of the United States Circuit Court in the compromise in permitting the judgment to be rendered, added anything of binding force to the compromise.

2d. Has the Government been *estopped* by any authorized action in the premises.

3d. Whether under the circumstances of the case there is a misjoinder of parties, and

4th. Is the bill as amended multifarious as to the subject matter, and does it, therefore, present a new case?

We are unaware of any statute of the United States which vests in the District Attorneys any power to com-

promise claims due the Government. If, in this respect, United States Attorneys have any power equal to or superior to the attorneys of private persons, employed to prosecute to effect and collect debts due their clients, it has not been called to our attention, and has escaped our research.

The power of an attorney is not co-equal or co-extensive with that of his client. He is a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of the client. He may enter into no bargains or contracts in reference to his client's rights as contra-distinguished from mere agreements as to the conduct of the suit, which will bind the client, unless he has been specially authorized, or his acts have been ratified by his employer.

Hooker als. vs. Parker, 7 Cranch., 436.
Robinson vs. Murphy, 69 Ala. 543.
Hall Safe and Lock Co. vs. Harwell, 88 Ala. 44.
Dewort vs. Loomer, 21 Conn. 245.
Vail vs. Conont, 15 Vt. 314.
Dout vs. Barnes, 1 Md. ch. 127.
Smith vs. Dixon, 3 Metcalf 438.
Smock vs. Dode, 5 Rand, (Va.) 639.
Marbury vs. Smith, 11 Kans. 562.

An attorney-at-law has authority, by virtue of his employment as such, to do in behalf of his clients all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affects the remedy only and not the cause of action.

We chiefly rely in this case upon the proposition as set forth in our 13th assignment of error (see record, p. 62.) and take issue with the learned judge, who in ren-

dering the opinion of the Circuit Court of Appeals below stated, "It is evident that this is a suit to vacate, annul and set aside the judgment of a court regularly entered in a matter of which it had jurisdiction," etc. We contend that there never was a judgment regularly entered, that the United States Circuit Court at Montgomery, Alabama, which originally heard said cause and the United States attorney who represented the Government in said trial, had no authority in law to accept statements and representations which were not made under oath, nor supported nor verified by evidence or proofs, and thus bind the Government, for the Court was without jurisdiction to render the judgment in question upon the facts as stated in the bill, and therefore, if this be true, it was nothing but a compromise of the Government's claim of twenty-eight thousand, one hundred and fifty-eight dollars and fifty-six cents ($28,158.56) by the United States attorney. We draw the attention of the court particularly to the manner in which the *separate* judgments of one hundred dollars each were rendered in the United States Circuit Court, that on February 6th, 1885, when judgment was obtained there was no jury in attendance in said Court, (see record, pages 29 and 30) that no witnesses were sworn or examined in behalf of the Government, that no witnesses were sworn in the interest of the defendants below, but "that said defendants came into Court and stated and represented" etc., (see Record pages 5 and 6), and that upon these uncontradicted facts, by appellees in this appeal, and with no other evidence or proof being introduced, or evidence being passed upon by a jury, and *no objection being made* by the *United States Attorney*, the claim of the Government amounting to twenty-eight thousand, one hundred and fifty-eight dollars and fifty-six cents

($28,158.56) was merged into a judgment *separately* entered "against them for one hundred dollars, they and *each* of them would pay said judgment and costs." (See Record page 6).

(*a*) We claim that upon the facts, as stated in the bill and uncontradicted there never has been a judgment rendered in this case by the United States Circuit Court.

(*b*) We contend taking the authority as quoted by counsel for all appellees, except the Henshaw heirs, viz: Robinson vs. Murphy, 69 Ala., 547; that there has been no valid judgment in this case for "an attorney-at-law is a special agent limited in duty and authority to the vigilent prosecutions or defense of the rights of his client. His authority to enter into bargains or contracts binding on his client, *unless expressly conferred* is confined within the limits of that professional action, which may be necessary for the conduct of the proceedings in the course of pending writs." How much more circumscribed and limited are the powers of an United States Attorney in the management of his client's interest, his authority being regulated and limited by statute, beyond which he has no authority to bind the United States Government.

We hold that the case of Holker vs. Parker, 7 Cranch, 436; is directly in point in this case, and that there really was less reason for setting aside the compromise in that case than in this because the authority of the attorney of a private individual is much greater than that of an United States Attorney.

(*c*) The argument adopted by counsel in brief for Henshaw's heirs, upon the question of the *verity* of the judgment roll, is that as the Government's contention is based upon the idea that the District Attorney "was remiss in the discharge of his official duties," and there-

fore the judgment should be set aside, in this, the learned counsel errs. The Government contends that as the Court and United States Attorney had no legal authority to act as they did in this case, and consequently no judgment being had, it is immaterial in the matter at bar whether the United States Attorney was remiss or not. The statutes of the United States provides the manner that compromises shall be effected with the Government, that there is no authority to compromise a demand which is in suit, except upon the satisfactory conclusion that the amount conceded is the correct amount of indebtedness, and this not being one of them it has no effect in law or equity and is not binding on the United States Government.

Revised Statutes, sec. 236.

Independently of the lack of power in the legal representative of the Government to compromise this claim, it is specially alleged in the bill, that his consent to the rendition of these judgments—absurdly disproportionate in amount to the claims of the United States against Beebe & Henshaw's estate—was obtained by fraud. Not mere general allegations of fraud, but by the specific statements of a false and fraudulent character, set out in paragraph 7, page 6 of the Record. Of course, on demurrer, these allegations *must* be taken as true.

The cases of Holker et al. vs. Parker, 7 Cranch and others, especially the former, clearly demonstrates that the decree of the Circuit Court should be reversed, if the opinion in the cases cited is law. Certainly the law as announced in the case in 7 Cranch, by Chief Justice Marshall has not been questioned. There the appellant's former attorney had, by misrepresentation of appellee, been induced to take a decree or award on arbitration for a much smaller amount than was actually due. He

had no more than the ordinary power of attorney to sue for and collect a claim due his client.

Justice Marshall, stating as a broad proposition of law that an attorney has no right to compromise his client's claims without express authority—held that the deception practiced on him by the appellee was sufficient of itself to vacate the judgments. And what was that deception? Exactly the same as practiced here on the U. S. District Attorney to obtain these judgments and thereby the release of their large liability, by Beebe and the Administrator of Henshaw, viz: that Beebe himself and Henshaw's estate were insolvent. Statements, which, in the case cited, and the case at bar were false, for here it is alleged that at the time of the said representation, said parties were in the possession of the valuable real estate mentioned aggregating in value $50,000.00—Paragraph 3, page 4 of Record. We forbear further comment, but request the Court's attention to all the authorities cited, and particularly the case in 7 Cranch.

Laches not chargeable to the Government, and further, there is no authority in any officer of the Government to make a tender.

Answering the argument of the counsel for the appellees upon the proposition that there is no equity in the bill, because there has never been an offer to return the amount collected upon the Beebe judgment nor offer to credit the judgment collected upon the debt.

We say:

(a) That laches are not imputable to the Government.

United States vs. Kirkpatrick, 9 Wheat, 199.
Dol vs. Postmaster General, 1 Peters, 318.
Gourman vs. United States, 97 U. S., 584.

(b) That there is no authority in any officer of the Government to make a tender.

(c) That it was not necessary to offer to credit the money collected under the Beebe judgment on the original debt, this was done by operation of law, and that the Government has a right to receive a partial pay ment on the debt of a defaulting officer and not be thereby *estopped* from proceeding in a proper manner to collect balance of debt.

Fire Ins. Co. vs. Wickham, 141 U. S., 564.

It is a reasonably well settled rule, that, unless the agreement to accept in satisfaction of an *ascertained* debt a sum less than the amount due, be founded on some *additional consideration*, the creditor is not precluded from recovering the rest of his claim. Even where the creditor gives a receipt in full upon payment of a portion of an undisputed account, he is not concluded thereby from recovering the balance, *although the receipt was given with knowledge and there was no error or fraud.*

Ryan vs. Ward, 48 N. Y., 204,
Harriman vs. Harriman, 12 Gray, 341,
Miller vs. Coster, 66 N. Y., 609,
Evans vs. Ponis, 1 Exch., 601,
Cooper vs. Parker, 14 C. B., 118,
Warren vs. Skinner, 20 Conn., 557.

The case chiefly relied on by counsel for appellees and the only one cited by the circuit court of appeals in affirming this case below; viz: U. S. vs. Throckmorton, 98 U. S., 61, has absolutely no bearing upon this case, for the reason that the *very thing* tried in the court below in that case; viz, whether the *grant or con-*

cession was false and fraudulent and whether the depositions were those of perjured witnesses or not, while upon the matters in the suits at law against said Beebe and Henshaw in the Circuit Court of the United States at Montgomery, Alabama, there was never any trial and it is on that very account that the bill in this case was filed and that we are here on appeal.

Appellees were chargeable with the law that required this claim to be settled by the Treasury Department.

Revised Statute, Section 236,
Revised Statute, Section 3469.
Paragraph 7 of instructions to District Attorneys issued by Solictor of the Treasury, July 15, 1877.

MULTIFARIOUS.

3d. The bill as amended is not multifarious in that it makes a new case. The theory on which the demurrers on this ground are based is that Henshaw and Henshaw's heirs were strangers to the claim and judgment against Beebe, of the United States in the matter of Dustan's bond, on which Beebe was security. This is true, but the demurrers must fall when it is remembered that the conveyance to Henshaw of Beebe's interest in the property described in the assignment—pages 12 and 13 of the Record, are alleged to have been without consideration and was fraudulent and void as to complainant. Further, the bill avers and the assignment shows that Henshaw was, after selling such parts of the

property conveyed as might be necessary to pay the debts of the firm of Henshaw & Beebe, to re-convey the balance to Beebe. And the bill further shows that none of the estate conveyed has been used for the purposes named in the deed, and is subject to Beebe's debts including the Government's claim on the Dustan judgment against Beebe. There was absolutely no change made in the character of the bill by the filing of the amendment. It merely seeks to add another amount due to the Government and payable out of the same property sought to be subjected.

See

Tilton vs. Cofield, 93 U. S. p. 136.
Hunter vs. United States, 5 Peters, 173.
Walden vs. Bodley, 14 Peters, 156.

MISJOINDER.

4th. This bill is not subject to the objection of misjoinder. Henshaw and his heirs held the property for the purposes named, and held it in trust for Beebe and his creditors of which the complainant is one. In cases of this kind it makes no difference how many grantees there may be of the fraudulent debtor, nor how disconnected their titles. All may be joined by the defrauded creditor in one bill, and so in all similar cases.

Gaines vs. Chew, 2 Howard 619.
Shields vs. Thomas, 18 Howard 253.
Heids vs. Heids, 80 Ala. 225.
Russell vs. Garrett, 75 Ala. 350.

Halstead vs. Shepard, 23 Ala. 538.
Handley et al. vs. Heflin, 84 Ala. 600.
Fellows vs. Fellows, 15 American Dec. 428.

Respectfully submitted,
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